

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

ORIGINAL 77-2083

To be argued by
JOHN S. MARTIN, JR.

United States Court of Appeals
FOR THE SECOND CIRCUIT

JOHN PETER GALANIS,
Petitioner-Appellant,
against

ERMEN PALLANICK, U. S. MARSHAL FOR
THE DISTRICT OF CONNECTICUT,
Respondent-Appellee.

APPEAL FROM JUDGMENT OF THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF CONNECTICUT
(Civ. No. N-77-140)

BRIEF ON BEHALF OF APPELLANT
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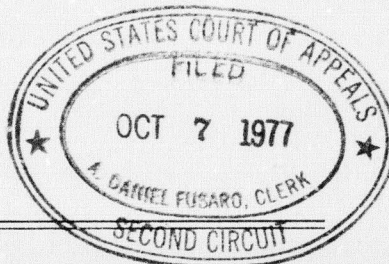


TABLE OF CONTENTS

	PAGE
Preliminary Statement	1
Issues Presented	1
Statement of the Case	2
A. From 1971-1976 Appellant Cooperated With United States Authorities Pursuant To A Grant Of Transactional Immunity	2
B. The Extradition Proceeding	4
POINT I—The Grant of Transactional Immunity To Galanis Precluded The United States From Pros- ecuting An Extradition Proceeding Involving A Crime He Had Disclosed	6
A. Since the Champion Savings & Loan fraud was a matter Galanis disclosed to the United States pursuant to a grant of transactional immunity, the United States cannot prosecute an extradition proceeding involving that crime	7
B. Assistant U.S. Attorney Brodsky's represen- tation that the United States could not par- ticipate in an extradition proceeding relating to Champion is binding on the United States	12
POINT II—The United States Failed To Meet Its Bur- den To Prove That The Evidence Submitted In Support Of Extradition Was Not Derived From Information Supplied By Galanis	14

	PAGE
POINT III—Galanis Is Not Extraditable Because He Was Proceeded Against And Punished In The United States For The Crime For Which His Extradition Is Sought	18
POINT IV—Galanis Is Not Extraditable Because The Evidence Introduced Below Was Not Authentici- cated In The Manner Required By 18 U.S.C. § 3190	25
Conclusion	30

TABLE OF AUTHORITIES

Cases:

<i>Asakura v. Seattle</i> , 265 U.S. 332 (1924)	22
<i>Berger v. Board of Psychologist Examiners</i> , 521 F.2d 1056, 1062 (D.C. Cir. 1975)	30
<i>Correale v. United States</i> , 479 F.2d 944, 947 (1st Cir. 1973)	13
<i>Ex Parte Charlton</i> , 185 Fed. 880 (C.C.N.J. 1911)	22
<i>Factor v. Laubenhimer</i> , 290 U.S. 276, 293-294 (1933)	21, 22
<i>Gallina v. Fraser</i> , 177 F.Supp. 856, 866 (D. Conn.), <i>aff'd. on opin. below</i> , 278 F.2d 77 (2d Cir.), <i>cert. den.</i> 364 U.S. 851 (1960), <i>reh. den.</i> 364 U.S. 906 (1960)	7
<i>Geofroy v. Riggs</i> , 133 U.S. 258 (1890)	22
<i>Greci v. Birknes</i> , 527 F.2d 956, 960 (1st Cir. 1976)	22, 23, 27
<i>Hauenstein v. Lynham</i> , 100 U.S. 483 (1879)	22
<i>In re Fowler</i> , 4 Fed. 303 (C.C.A.N.Y. 1880)	27

TABLE OF CONTENTS

iii

	PAGE
<i>In re Kinoy</i> , 326 F. Supp. 407, 419 (S.D.N.Y. 1971)	17, 18
<i>In re McPhun</i> , 30 Fed. 57 (C.C.A.N.Y. 1887)	27
<i>Iriarte v. United States</i> , 157 F.2d 105, 108 (1st Cir.), cert. denied 335 U.S. 816 (1948)	23
<i>Jordan v. Tashiro</i> , 278 U.S. 123, 127 (1928)	22
<i>Kastigar v. United States</i> , 406 U.S. 441 (1972)	8, 12, 15
<i>King of the Two Sicilies v. Willcox</i> , 7 State Trials (N.S.) 1049, 1068	11
<i>Landay v. United States</i> , 108 F.2d 698, 705-706 (6th Cir. 1939)	21
<i>Malloy v. Hogan</i> , 378 U.S. 1 (1964)	7, 10
<i>Murphy v. Waterfront Commission</i> , 378 U.S. 52 (1964)	10, 11
<i>Palermo v. Warden, Green Haven State Prison</i> , 545 F.2d 286 (2d Cir. 1976)	13, 19
<i>Piccirillo v. New York</i> , 400 U.S. 543, 568-569 (1971), (Brennan, J. dissenting)	8, 9
<i>Reid v. Covert</i> , 354 U.S. 1, 16, 17 (1957)	17
<i>Rivers v. Lucas</i> , 477 F.2d 199, 212 (6th Cir.), vac. and rem. on issue of mootness 414 U.S. 896 (1973)	19
<i>Ross v. McIntyre</i> , 140 U.S. 453, 475 (1891)	22
<i>Shanks v. DuPont</i> , 3 Pet. 242 (1830)	22
<i>Shapiro v. Ferrandina</i> , 478 F.2d 894, 904 (2d Cir.), cert. dismissed 414 U.S. 884 (1973)	27, 28
<i>Shonbrun v. Dreiband</i> , 268 F.Supp. 332 (E.D.N.Y. 1967)	9
<i>Tucker v. Alexandroff</i> , 183 U.S. 424 (1902)	21

	PAGE
<i>Ullman v. United States</i> , 350 U.S. 422, 426, 429 (1956)	9, 10, 11
<i>United States v. Hinton</i> , 543 F.2d 1002 (2d Cir. 1976)	18
<i>United States v. Karathanos</i> , 531 F.2d 26, 35 (2d Cir. 1976)	16
<i>United States v. Kurzer</i> , 534 F.2d 511 (2d Cir. 1976)	16
<i>United States v. Nemes</i> , 555 F.2d 51 (2d Cir. 1977)	14, 15
<i>Valentine v. United States</i> , 299 U.S. 5, 10 (1936) ..	21, 22
 Statutes and Treaties:	
18 U.S.C. § 3184	5, 28
18 U.S.C. § 3190	2, 5, 25, 26, 27, 28
Webster-Ashburton Treaty, 1842, 8 Stat. 572 ...	20, 22, 24
Extradition Treaty of 1931 Between the United States and Great Britain, U.S. TS 849, 47 Stat. 2122, 2124, IV Trenwith, Treaties, etc. (1938) 4274, 4276	19
Treaty of Extradition Between the United States and Canada of 1971, TIAS 8237	2, 5, 17, 18, 19, 20, 21, 22, 23, 24, 25
 Miscellaneous:	
5 Hackworth, Digest of International Law, § 496 (1973)	22
6 Whiteman, Digest of International Law, § 40 (1968)	19
4 Wigmore, Evidence (Chadbourn Revision) §§ 1345- 1352, 2492	29
Note, 86 Harvard Law Review 1, 187-188 (1972) ...	18
Note, 28 Yale Law Journal 171, 179 (1972)	18

BRIEF ON BEHALF OF APPELLANT JOHN PETER GALANIS

Preliminary Statement

John Peter Galanis appeals from an order of the Honorable Robert C. Zampano entered in the United States District Court for the District of Connecticut on June 16, 1977 dismissing Galanis' petition for a writ of habeas corpus to review an order of the Honorable Jon O. Newman, sitting as an extraditing magistrate, which order certified that Galanis was extraditable to Canada. The opinions of Judges Zampano and Newman which are not yet reported are set forth in the Appendix at pp. A.54 and A.6, respectively.

Issues Presented

1. If the United States has granted a witness "transactional" immunity, can it thereafter prosecute an extradition proceeding against the witness involving one of the crimes he disclosed pursuant to that immunity?
2. Is the United States bound by a representation made by an Assistant United States Attorney to secure the continued cooperation of a witness previously granted transactional immunity that the United States could not prosecute an extradition proceeding against the witness that involved a crime he had previously disclosed?
3. May the United States extradite a party for an offense which that party had previously disclosed pursuant to a grant of immunity without proving that there is an independent, "untainted," source for the evidence which the United States is offering to support extradition?

4. In an extradition proceeding commenced in September 1976, is the defendant entitled to the protection of the provision prohibiting dual prosecution for the same offense contained in the 1971 Treaty of Extradition Between the United States and Canada which entered into force on March 22, 1976?

5. Is the defendant in an extradition proceeding precluded by the presence of a U.S. Consular certificate from proving that the evidence against him is not "properly and legally authenticated" within the meaning of 18 U.S.C. § 3190?

Statement of the Case

This case involves an attempt by the United States to extradite one of its citizens, John Peter Galanis, to Canada where he faces prosecution on charges filed in 1973, which charges involve matters Galanis disclosed in 1972 to the United States Attorney for the Southern District of New York pursuant to a grant of transactional immunity.

A. From 1971-1976 Appellant Cooperated With United States Authorities Pursuant To A Grant Of Transactional Immunity.

From June 1971 through February 1976 appellant Galanis cooperated with the United States Attorney and the S.E.C. in their investigation of a wide range of securities frauds and related crimes. The evidence at the extradition hearing demonstrated that

"As a direct result of his assistance, the United States Attorney's Office for the Southern District of New York developed nearly twenty different investigations and obtained numerous indictments, convictions and additional informants. When the defendant was sen-

tenced, Assistant United States Attorney Brodsky described the information furnished by [Galanis] as 'completely candid and honest' and represented to the Court that Galanis had persisted in his cooperation despite at least two verified threats to his family safety." (A. 9-10).*

Galanis was himself a participant in many of the crimes he disclosed and his cooperation was part of an arrangement pursuant to which he agreed to plead guilty to felony charges carrying a maximum possible jail sentence of ten years and was given "full transactional immunity" for all other matters he disclosed (TR. 12, 36). In December 1972 and January 1973, Galanis pleaded guilty to two felony indictments on which he was sentenced in February 1973.

Former Assistant U. S. Attorney David Brodsky, who in 1972 was in charge of all Galanis-related matters, testified that one of the items which Galanis disclosed pursuant to this immunity arrangement was a fraud involving Champion Savings & Loan, Ltd., in which funds were taken out of Champion in Canada, routed through a foreign bank and ultimately brought into New York. Although Brodsky concluded that a fraud was involved over which the United States had jurisdiction, as a matter of his tactical choice this fraud was not made the basis of either of the formal charges to which Galanis pleaded guilty (TR. 14-17).**

* References in the form "A." are to the joint appendix. Those in the form "TR." are to relevant portions of the transcripts of the proceedings before Judges Newman and Zampano which were produced at the end of the joint appendix. References in the form "SR." are to the document numbers in the First Supplement to the Record on Appeal; those in the form "R." are to the document numbers in the Record on Appeal as originally filed.

** Thus, Brodsky testified that although there were a number of different cases in which Galanis might have entered his plea "as a prosecutorial decision, it was more valuable to have him plead guilty in a case where he was going to be a witness at a trial" (TR. 13).

In February 1973, just six months after Galanis disclosed the Champion Savings & Loan matter to the United States authorities, and after Galanis had entered his guilty pleas in this country, a fraud charge relating to the Champion Savings & Loan matter was filed against Galanis in Canada.

There has been no express consideration given to the possibility of United States involvement in an extradition proceeding at the time Galanis' original transactional immunity agreement had been made with the United States Attorney. Thus, when the Canadian charge was filed, Galanis' lawyers asked Mr. Brodsky whether there was any need to amend Galanis' agreement to provide expressly that the United States would not participate in any extradition proceeding. Mr. Brodsky said that there was no need for anything further because the original grant of transactional immunity precluded the United States from becoming involved in such an extradition proceeding. Thus, Brodsky testified:

A. "The question that was put to me was, as my recollection is, 'Do you think there is anything which should be done involving the U.S. participation in this request?'

"And I said . . . I don't think you need anything more on this agreement to cover you. I think you're covered." (TR. 40-41).

Thereafter Galanis continued his cooperation with the United States authorities, and Canada did not press its request for extradition.

In early 1976 Galanis testified in the last of the cases arising from his cooperation (TR. 124).

B. The Extradition Proceeding

On September 1, 1976 the United States filed a complaint seeking the extradition of appellant Galanis to Canada,

and a warrant of arrest was issued. Galanis was arrested on September 9, 1976 and was released on bail that day (SR. 1-6).

On November 23, 1976 an extradition hearing pursuant to 18 U.S.C. § 3184 was begun before the Hon. John O. Newman (SR. 13). On that date Galanis' counsel moved to dismiss the proceedings on the ground that the participation of the United States in such a proceeding violated the Government's immunity agreement with Galanis (SR. 10). The hearing was then adjourned to December 3, 1976. On that date Galanis' counsel made additional motions to dismiss the proceedings including a claim that, since the Champion matter was one of the crimes encompassed within Galanis' plea agreement, he had in effect been proceeded against and punished in the United States for the crime for which his extradition was sought and, thus, under Article 4 of the Treaty on Extradition Between the United States and Canada of 1971 he could not be extradited (SR. 11). On December 3 the Court heard testimony from four witnesses relating to Galanis' claims that the participation of the United States in the extradition proceeding violated his immunity agreement and that he could not be extradited because he had already been proceeded against and punished in this country for the crime for which his extradition was sought (SR. 14). The hearing was then adjourned to December 6 at which time the Court heard testimony from two experts in Canadian law on the issue of whether the documents submitted in support of the request for extradition were "properly and legally authenticated so as to entitle them to be received in evidence for similar purposes by the tribunals . . ." in Canada. 18 U.S.C. § 3190. (SR. 15).

On March 8, 1977, Judge Newman filed a decision and order in which he denied Galanis' motions to dismiss the extradition proceeding and found that the evidence submitted in support of the request for extradition was properly authenticated and established probable cause to

believe that Galanis committed the offenses charged (A. 6-53).

On March 25, Galanis filed a petition for a writ of habeas corpus seeking review of Judge Newman's decision denying his motion to dismiss the extradition proceeding and ordering his extradition (R. 1). Argument on the habeas corpus application was had before the Hon. Robert C. Zampano on April 26, 1977 (R. 5). On June 16 Judge Zampano entered an order denying the petition (A. 54-58). This appeal follows.

POINT I

The Grant of Transactional Immunity To Galanis Precluded The United States From Prosecuting An Extradition Proceeding Involving A Crime He Had Disclosed.

Appellant contends that the transactional immunity conferred upon him in 1971 when he began to cooperate with the United States authorities precluded the United States from prosecuting an extradition proceeding in 1976 relating to a matter he disclosed in 1972. Alternatively, appellant contends that, even if the grant of transactional immunity did not have that effect, the United States is bound by the representation of Assistant U.S. Attorney Brodsky that the United States could not participate in any extradition proceeding relating to a transaction Galanis had disclosed, which representation was made to Galanis' attorney in 1973 for the purpose of securing Galanis' continued cooperation.*

* In his opinion denying habeas corpus relief, Judge Zampano suggested that he might not have jurisdiction as a habeas judge to review Galanis' fifth amendment claims. (A. 56). Although he was correct in stating that the scope of review on a petition for a writ of habeas corpus in international extradition cases is ordinarily

(footnote continued on following page)

A. Since the Champion Savings & Loan fraud was a matter Galanis disclosed to the United States pursuant to a grant of transactional immunity, the United States cannot prosecute an extradition proceeding involving that crime.

There is no question that at the time he began to cooperate with the United States authorities, Galanis was told that he was being granted "complete transactional immunity" (TR. 12, 36) or that the Champion Savings & Loan fraud was one of the matters that Galanis disclosed pursuant to the grant of immunity. (TR. 14, 16).

While the opinion of Judge Newman does not contain an express finding as to the type of immunity originally conferred on Galanis, during the habeas corpus proceeding before Judge Zampano, the Government conceded that at the time he made his agreement with the United States, "Mr. Galanis was granted informal transactional immunity from prosecution by the United States." (TR 148). As Government counsel explained to Judge Zampano, at the time Galanis made his agreement, the Government

"promised Mr. Galanis 'We won't prosecute you for anything arising out of these matters.' They didn't say 'We won't use the testimony you give us.' They said 'We won't prosecute you on it.' That's what I'm

(footnote continued from preceding page)

limited to the three questions of jurisdiction, extraditability and probable cause, he erroneously overlooked the equally significant consideration, common to all habeas petitions, that the conduct of the prior hearing must be consistent with the petitioner's due process rights. Thus, this Circuit has recognized, at least as early as its decision in *Gallina v. Fraser*, 278 F.2d 77 (1960), that an extradition proceeding must meet the standards of due process and that the question of whether such a proceeding was consistent with the Constitution is cognizable on habeas review. *Id.*, 177 F.Supp. 856, 866 (D. Conn. 1959), *opin. of U.S.D.J. Smith specifically adopted*, 278 F.2d 77 (2d Cir. 1960), *cert. den.*, 364 U.S. 851, *reh. den.*, 364 U.S. 906 (1960). It cannot be gainsaid that a violation of a person's fifth amendment rights is a denial of due process. See, e.g., *Malloy v. Hogan*, 378 U.S. 1 (1964).

considering and that's what the Southern District of New York considered to be an informal grant of transactional immunity. . . ." (TR 150).*

We start then with three undisputed facts:

- 1) The United States conferred transactional immunity on Galanis,
- 2) one of the transactions he disclosed was the Champion Savings & Loan fraud, and
- 3) this extradition proceeding which the United States is prosecuting against Galanis involves the Champion Savings & Loan fraud.

There can certainly be no question that the grant of transactional immunity would preclude the United States from bringing any criminal proceeding against Galanis concerning the Champion Savings & Loan matter, even though it now had overwhelming evidence that was completely independent of Galanis' disclosure. See generally, *Kastigar v. United States*, 406 U.S. 441 (1972); *Piccirillo*

* Judge Newman's decision that Galanis had only "use" immunity as to extradition was made without the benefit of the concession that the Government made before Judge Zampano that in 1971 Galanis was granted transactional immunity from prosecution by the United States. Thus, Judge Newman attempted to determine the scope of Galanis' immunity by analyzing documents prepared in 1973, without addressing the basic question of what effect the grant of transactional immunity in 1971 had on an attempt by the United States to prosecute an extradition proceeding in 1976 involving a transaction disclosed in 1972 pursuant to the original immunity. We concede that at the time Galanis began cooperating with the Government, neither he nor the Government representatives foresaw a Canadian request for extradition. Our argument was, and is, that the nature of "transactional immunity" is such that once transactional immunity had been granted, the Government was precluded from participating in any proceeding against Galanis relating to any transaction he disclosed, including an unforeseen extradition proceeding. Judge Newman never addressed himself to that issue.

v. *New York*, 400 U.S. 548, 568-569 (1971) (Brennan J., dissenting). The question that remains, therefore, is whether Galanis' fifth amendment rights are subject to the same protection when the United States seeks to prosecute an extradition proceeding relating to an offense he disclosed.

Note should be made at the outset that we are not contending that Canada is precluded from seeking Galanis' extradition in a proceeding instituted by private counsel. See, e.g., *Shonbrun v. Dreiband*, 268 F.Supp. 332 (E.D.N.Y. 1967). Our argument here is only that the United States Government is precluded from prosecuting an extradition proceeding relating to a matter disclosed by Galanis pursuant to a grant of transactional immunity.

In considering whether a defendant's fifth amendment rights should be protected from violation by the United States in an extradition proceeding, it is helpful to consider the following hypothetical situation. Assume defendant A had been granted "use" immunity only and pursuant to that immunity he had given a written statement acknowledging a fraud on Company B. If a fifth amendment claim could not be raised in an extradition proceeding, it would follow that the written statement A gave to the United States pursuant to the grant of immunity could be used by the United States against A in that extradition proceeding. Indeed, the logic of such analysis is that the "immunized" statement of defendant A could be used as the sole basis to extradite him to a foreign country to face prosecution on the charge of defrauding Company B.

Obviously such a result is completely at odds with the teaching of the Supreme Court that the fifth amendment's protection "must not be interpreted in a hostile or niggardly spirit" and that "it is in the spirit of strict, not lax, observance of the constitutional protection of the individual . . ." that fifth amendment claims must be judged. *Ullman v. United States*, 350 U.S. 422, 426, 429

(1956); See *Malloy v. Hogan*, 378 U.S. 1 (1964); *Murphy v. Waterfront Commission*, 378 U.S. 52 (1964).

Indeed, neither the Government nor Judge Newman, who conducted the extradition hearing, contended that Galanis' fifth amendment rights were not entitled to protection in the extradition proceeding. The Government's contention, adopted by Judge Newman, was that Galanis was entitled only to use immunity in the extradition proceeding. But if his fifth amendment claim was cognizable in the extradition proceeding, Galanis was entitled to the benefits of the "transactional" immunity he was originally granted. The fact that an extradition proceeding was not foreseen at the time immunity was conferred could not reduce the "transactional" immunity that Galanis obtained to mere "use" immunity.

The Government's original purpose in granting Galanis "transactional" immunity was to obtain from Galanis the complete and open disclosure of information of great value to the United States by removing any fear of future prosecution for the matters disclosed. See TR. 30. Since in conferring this immunity the United States was obviously willing to preclude not only its own prosecution but also any state prosecution for the transactions disclosed (see *Malloy v. Hogan*, *supra*; *Murphy v. Waterfront Commission*, *supra*), there was no reason for Galanis to consider that the United States was somehow reserving the right to participate in an extradition proceeding against him should some foreign country request his extradition for one of the crimes disclosed. Had the United States in 1973 sent David Brodsky into court to seek Galanis' extradition to Canada for prosecution on the Champion Savings & Loan fraud, Galanis would legitimately have felt betrayed. The fact that the Government waited three years and used a different United States Attorney to prosecute the extradition proceeding does not change the fact that the United States is attempting to abrogate its grant of "complete transactional immunity" to Galanis.

Finally, we note that considerations of public policy support our contention that a defendant's full fifth amendment rights are entitled to protection in an extradition proceeding. The Supreme Court has expressly left open the question whether a witness who has been granted immunity in this country may still rely on his fifth amendment rights and refuse to testify, if he can show a reasonable basis for a fear that his testimony might be used against him in a foreign prosecution. In *Murphy v. Waterfront Commission, supra*, 378 U.S. at 60-61, the issue was discussed and the Supreme Court noted that one of the reasons given for not recognizing such a claim of possible foreign use is

"that 'in order to make the disclosure dangerous to the party who objects, it is essential that he should first quit the protection of our laws and willfully go within the jurisdiction of the laws he has violated.'"
378 U.S. at 67 (quoting *King of the Two Sicilies v. Willcox*, 7 State Trials (N.S.) 1049, 1068).

Obviously this argument would have no force if our courts refused to recognize a fifth amendment immunity claim in an extradition proceeding. If, however, a claim of a violation of a grant of immunity is cognizable in an extradition proceeding, the courts of this country could protect a witness from the fear that his immunized testimony would be the basis for his extradition to a foreign jurisdiction.

Since the Government generally grants immunity only when it believes that the Witness has testimony of substantial value to the United States, it is in the public interest for the courts to encourage immunized witnesses to testify completely and openly. *Ullman v. U.S., supra*. That interest is best served by assuring the witness that his immunity will be respected in any subsequent extradition proceeding.

In sum, precedent, logic and considerations of public policy support the conclusion that a witness who has been granted immunity should be entitled to raise in an extradition proceeding a claim that his grant of immunity has been violated. In most cases, this will merely involve a claim that the witness' immunized testimony is being used against him, for under *Kastigar v. United States, supra*, the Government need only give witnesses use immunity. If, however, the Government chooses to give a witness "transactional immunity" in order to encourage the most complete and open disclosure by the witness, it must recognize that the grant of transactional immunity will preclude it from prosecuting an extradition proceeding against that individual if, as here, the crime charged is one that the witness has disclosed.

B. Assistant U.S. Attorney Brodsky's representation that the United States could not participate in an extradition proceeding relating to Champion is binding on the United States.

We believe we have demonstrated above that it follows from the nature of transactional immunity that once a witness has been granted such immunity by the United States, its representatives cannot prosecute any extradition proceeding relating to a disclosed transaction. This conclusion is the same as that reached by Assistant U.S. Attorney Brodsky in 1973 when the Canadian charge was originally filed and Mr. Galanis' attorneys approached him about the possible need for an amendment to Galanis' agreement with the United States to protect Galanis so "that he could continue to be a witness for the government." (TR. 40). Mr. Brodsky testified:

"I said I didn't think there was. I thought that he had been bathed successfully for everything he had been involved in.

"Q. Bathed as against U.S. prosecution?

"A. Bathed as against U.S. prosecution or involvement. The question that was put to me was, as my recollection is, 'Do you think there is anything which should be done or can be done or ought to be done involving the U.S. participation in this request?'

"And I said * * * 'I don't think you need anything more on this agreement to cover you. I think you're covered.' " (TR 40-43).

Since this representation was made to persuade Galanis to continue to cooperate with the Government and to testify at additional trials (TR. 25-26), which he did, the Government was bound to abide by that representation and refrain from prosecuting this extradition proceeding. As this Court recently noted in a closely analogous case, *Palermo v. Warden, Green Haven State Prison*, 545 F.2d 286 (1976):

"fundamental fairness and public confidence require that prosecutors be held to 'meticulous standards of promise and performance.'

* * *

"Where a defendant . . . reasonably relies on promises by the prosecutors which are in fact unfulfillable, he has the right to have those promises fulfilled."

Thus, even if Mr. Brodsky was wrong as a matter of law in stating the grant of transactional immunity would preclude the Government from participating in an extradition proceeding, Galanis has a right to have that representation fulfilled.

As was said in *Correale v. United States*, 479 F.2d 944, 947 (1st Cir. 1973):

"Prosecutorial misrepresentations, though made in good faith, even to obtain a just, and . . . desired end are not acceptable. Ignorance of the law is no excuse for the government. . . ."

Mr. Galanis was, therefore, entitled to hold the Government to the position stated by Mr. Brodsky in order to obtain his continued cooperation, i.e., that the United States would not participate in any extradition proceeding involving transactions disclosed by Galanis.

POINT II

The United States Failed To Meet Its Burden To Prove That The Evidence Submitted In Support Of Extradition Was Not Derived From Information Supplied By Galanis.

The Government has never contested the fact that it would be a violation of due process for it to introduce evidence at the extradition proceeding that was derived from information that Galanis supplied under a grant of immunity.

At the hearing the Government attempted to meet its burden in this regard through the testimony of Brodsky and Lester Green, the S.E.C. attorney responsible for Galanis-related matters, that they had not disclosed any information derived from Galanis to the Canadian authorities and the testimony of George Prenovost, a Canadian official, that except for a few documents they specifically requested from the S.E.C., the Canadian authorities had not obtained any information about Galanis from the United States authorities.

The hearing in this case and Judge Newman's decision occurred prior to this Court's decision in *United States v. Nemes*, 555 F.2d 51 (2d Cir. 1977)* in which this Court specifically rejected the contention that lack of taint could

* Since Judge Newman sat by designation on this Court and wrote the *Nemes* decision, it should also be noted that the argument in *Nemes* was two weeks after Judge Newman filed his opinion in this case.

be established by proof that the prosecutor did not have access to the immunized testimony, stating

"The inference that the prosecutor's lack of access to compelled testimony assures the existence of independent sources cannot be relied upon to afford the witness the full protection the Constitution guarantees. The prosecutor may have never seen the witness' testimony and may believe in good faith that no one associated with the federal prosecution has seen it, but such a disclaimer does not preclude the possibility that someone who has seen the compelled testimony was thereby led to evidence that was furnished to federal investigators. *Only by affirmatively proving that his evidence comes from sources independent of the immunized testimony can the prosecutor assure that the witness is in the same position he would have enjoyed had his self-incrimination privilege not been displaced by use immunity.* The Government's burden is a 'heavy' one, *Kastigar v. United States, supra*, 406 U.S. at 461, and properly so lest it become the 'loose net to trap tainted evidence' of which Mr. Justice Marshall warned in dissenting as to the constitutionality of use immunity. *Id.* at 467, 469." (Emphasis added)

It is clear that the Government did not meet this standard here, since Mr. Prenovost did not identify a single independent source for the Canadian Government's evidence that Galanis was involved in a fraud on Champion.

Despite the lack of any testimony as to an independent source of the Canadian Government's evidence against Galanis, Judge Newman found that there was an independent source because the bulk of the evidence to sustain probable cause "comes from the deposition testimony of Theodore Arnold and corporate and banking records available wholly independent of Galanis' testimony." (A. 24).

Not only was there no evidence of an independent source other than Galanis which led the Canadian authorities to the corporate and banking records, but the record strongly supports the conclusion that the testimony of Theodore Arnold was directly derived from information supplied by Galanis.

Lester Green of the S.E.C. testified that one of the people about whom Galanis provided information was Mr. Arnold (SR. 14, p. 131). Indeed, Green testified that Galanis specifically told him Arnold was involved in the Champion transaction. Mr. Green's testimony also established that, after Galanis gave information about Arnold, he began to cooperate with the United States (*Id.* at pp. 144-145). The next thing we know is that in 1973 Arnold becomes a witness for the Canadians against Galanis. The inescapable inference from this chain of events is that Arnold, having learned Galanis had informed against him to the United States authorities, turned on Galanis and testified against him in the Canadian proceeding. Given this un rebutted inference as to the tainted source of the Arnold testimony, the Government totally failed to meet its burden of showing that the Arnold deposition was not derived from information supplied by Galanis. See *United States v. Kurzer*, 534 F.2d 511 (2d Cir. 1976), in which this Court recognized that the testimony of a living witness should be suppressed if it is derived from a tainted source. See also, *United States v. Karathanos*, 531 F.2d 26, 35 (2d Cir. 1976).

In his opinion in this case, Judge Newman suggested that in an extradition proceeding it might be appropriate to lessen the Government's burden of proving lack of taint. Recognizing that there was no authority for applying a lesser standard for the protection of a citizen's constitutional rights in an extradition proceeding, Judge Newman attempted to justify the use of a lesser burden of proof on the policy ground that foreign countries have treaty rights which should not be burdened "by having to demon-

strate to the extraditing magistrate that an independent source exists for all evidence presented in support of extradition." (A. 23-24).^{*} This reasoning is, however, directly contrary to the express teaching of the Supreme Court in *Reid v. Covert*, 354 U.S. 1, 16, 17 (1957) where the court said:

" . . . no agreement with a foreign nation can confer power on the Congress or on any other branch of Government which is free from the restraints of the Constitution.

* * *

"It would be manifestly contrary to the objectives of those who created the Constitution, as well as those who were responsible for the Bill of Rights—let alone alien to our entire constitutional history and tradition—to construe Article VI [the Supremacy Clause] as permitting the United States to exercise power under an international agreement without observing constitutional prohibitions. . . . The prohibitions of the Constitution were designed to apply to all branches of the National Government and they cannot be nullified by the Executive or by the Executive and the Senate combined."

Moreover, a foreign government which has the cooperation of the United States is in a far better position than the defendant to prove the source of its evidence. It is rare, indeed, when a defendant has any knowledge whatsoever of the original source of the Government's evidence against him. As the court observed in *In re Kinoy*, 326

^{*} Judge Newman also suggested that a foreign country would expect that its treaty rights would not be diluted by an immunity agreement to which it was not a party. But as we demonstrate more fully below, see Point III *infra*, the 1971 Treaty specifically recognizes that the demanding country's right to extradition can be diluted by the unilateral decision of the requested state to prosecute the defendant on the same charge.

F.Supp. 407, 419 (S.D.N.Y. 1971):

"To say that a witness can successfully rebut the Government's proof that its source is untainted is to be naive about the imbalance which daily attends the resources of the Government as opposed to those of the average defendant in a criminal case."

See also, *United States v. Hinton*, 543 F.2d 1002 (2d Cir. 1976); Note, 28 Yale L.J. 171, 179 (1972); Note, 86 Harv. L.Rev. 1, 187-188 (1972). This imbalance is even more pronounced in an extradition proceeding involving, as it does, prosecution by a foreign sovereignty which alone has knowledge of the sources of its information.

Thus, there is no rational basis for applying a lesser burden on the Government to prove lack of taint in an extradition proceeding. And, if the taint burden of *Nemes* is applied here, it is clear that the Government did not meet its burden.

POINT III

Galanis Is Not Extraditable Because He Was Proceeded Against And Punished In The United States For The Crime For Which His Extradition Is Sought.

Canada is seeking to extradite Galanis pursuant to the terms of the Treaty of Extradition Between the United States and Canada of 1971,* Article 4 of which expressly prohibits the extradition of persons who have already been proceeded against and punished in the United States for the crime for which extradition is sought. Specifically, it provides:

"Extradition shall not be granted:

When the person whose surrender is sought is being proceeded against, or has been tried and

* See Magistrate's Warrant of Arrest dated September 1, 1976. (SR. 5).

discharged or punished in the territory of the requested state for the offense for which his extradition is requested."

Such a provision against dual punishment is common to most extradition treaties and laws. 6 Whiteman, Digest of International Law § 40 (1968). For example, Article 4 of the Extradition Treaty of 1931 Between the United States and Great Britain provides:

"The extradition shall not take place if the person claimed has already been tried and discharged or punished, or is still under trial in the territories of the High Contracting Party applied to, for the crime or offence for which his extradition is demanded. . . ." U.S. TS 849, 47 Stat. 2122, 2124 IV Trenwith, Treaties, etc. (1938) 4274, 4276.

The Government apparently does not dispute that Galanis, by virtue of his guilty pleas and sentence, has already been proceeded against and punished in this country for the Champion Savings matter, among others. The testimony of David Brodsky at the hearing before Judge Newman and the contemporaneous documents establish that at the time Galanis entered his pleas of guilty and was sentenced, the Government was aware of his fraudulent activity in Champion Savings & Loan, the United States had jurisdiction over that offense, and Galanis' pleas and sentence encompassed that as well as the other offenses Galanis had disclosed. (TR. 14-17). Consequently, Galanis could not be subject to further prosecution in this country for that fraud. *Rivers v. Lucas*, 477 F.2d 199, 212 (6th Cir. 1973), *vac. and rem. on issue of mootness*, 414 U.S. 896 (1973); See generally, *Palermo v. Warden, Green Haven State Prison*, *supra*.

Since, for the purpose of the laws of the United States, Galanis was, in fact, proceeded against and punished for the Champion Savings matter, he is, in accordance with

the express provisions of Article 4 of the 1971 Treaty, immune from extradition to Canada therefor.

While Judge Newman apparently agreed that Article 4 would bar extradition, he held that the provisions of the 1971 Treaty did not govern the instant proceeding because the crime charged occurred prior to the entry into force of the Treaty. Instead, he found that the 1842 Webster-Ashburton Treaty between the United States and Great Britain controlled, which treaty affords no substantive or procedural rights to the accused and simply lists seven extraditable offenses. In reaching his conclusion, Judge Newman relied on the savings clause in Subsection 2 of Article 18 of the 1971 Treaty which, while repealing all previous extradition agreements between the parties, preserves for extradition and prosecution any extraditable crimes committed "prior to entry into force" of the new Treaty.*

This savings clause must be read in the context of Subsection (3) of the same Article, which states that the Treaty shall not become effective until the exchange of ratifications. Thus, although the Treaty was signed on December 3, 1971, it was not ratified and the ratifications exchanged until March 22, 1976, almost five years later. The obvious reason for the inclusion in Article 18 of the savings clause, therefore, was not to limit the substantive and procedural rights it conferred on United States citizens, but rather to preclude a defendant from arguing that he could not be extradited because his offense was committed during the as yet undetermined length of the transition period between execution of the Treaty and

* Subsection 2 of Article 18 provides:

"(2) This Treaty shall terminate and replace any extradition agreements and provisions on extradition in any other agreement in force between the United States and Canada; except that the crimes listed in such agreements and committed prior to entry into force of this Treaty shall be subject to extradition pursuant to the provisions of such agreements."

repeal of prior treaties, and the exchange of ratifications. As it turned out, this transition period lasted for nearly five years, thus demonstrating the wisdom of such a savings clause.

Subsection (2) was also necessary to clarify that the 1971 Treaty would not be applied retroactively to offenses committed prior to the entry into force of the Treaty which were not previously extraditable, as, for example, air piracy. (Schedule of Offenses, #23). Moreover, it may also have been designed to preclude defendants whose extradition proceedings were already in progress on the date the Treaty became effective from arguing that the proceedings had to be reinstituted to comply with the provisions of the new Treaty. Cf., *Landay v. United States*, 108 F.2d 698, 705-6 (6th Cir. 1939).

There is no basis for assuming that either Canada or the United States included Article 18 in the Treaty to assure that persons who committed extraditable offenses prior to the entry into force of the Treaty, but whose extradition was sought thereafter, would have fewer rights than those whose offenses occurred after that date.

The argument that the language of Article 18 should be construed to strip Galanis of the rights granted to other persons whose extradition may be sought under the new Treaty runs counter to the long-established principles relating to the construction of extradition treaties set forth by the Supreme Court in *Factor v. Laubenheimer*, 290 U.S. 276, 293-294 (1933):

"In choosing between conflicting interpretations of a treaty obligation a narrow and restricted construction is to be avoided as not consonant with the principles deemed controlling in the interpretation of international agreements."

See also, *Tucker v. Alexandroff*, 183 U.S. 424 (1902); *Valentine v. United States*, 299 U.S. 5, 10 (1936). Even

more significantly, the Court stated that "if a treaty fairly admits of two constructions, one restricting the rights which may be claimed under it, and the other enlarging it, the more liberal construction is to be preferred." *Factor v. Laubenheimer*, *supra*, at 294. See also, *Jordan v. Tashiro*, 278 U.S. 123, 127 (1928); *Asakura v. Seattle*, 265 U.S. 332 (1924); *Ross v. McIntyre*, 140 U.S. 453, 475 (1891); *Geofroy v. Rigg*, 133 U.S. 258 (1890); *Hauenstein v. Lynham*, 100 U.S. 483 (1879); *Shanks v. Dupont*, 3 Pet. 242 (1830); *Ex Parte Charlton*, 185 Fed. 880 (C.C.N.J., 1911); 5 Hackworth, Digest of International Law § 496 (1943).

In construing a treaty, like any other contract, the court must attempt to determine the intent of the parties. As the Supreme Court said in *Valentine v. United States*, *supra* at 10:

"It is a familiar rule that the obligations of the treaties should be liberally construed to give effect to the apparent intention of the parties."

The construction which we urge is the only one consistent with a logical assessment of the intent of the parties. As we noted above, a provision against dual prosecution is common to most extradition treaties. Thus, the inclusion of such a provision in the Canadian treaty was not a radical departure from past practices but was rather a logical part of an overall attempt to modernize an 1842 Treaty which contained little specification of the procedural and substantive safeguards to be afforded to the party whose extradition was sought.

The various provisions incorporated in the Treaty at the time it was signed in 1971 obviously represented the current thinking of the two sovereignties regarding such substantive and procedural rights. See *Greci v. Birknes*, 527 F.2d 956, 960 (1st Cir. 1976). It is inconceivable that

either country would have envisioned a situation where two individuals whose extradition was sought after entry into force of the Treaty would have significantly different rights because in one case the offense at issue occurred in 1971, and in the other the offense occurred in 1976. Obviously, both countries intended that once the new treaty was in force, its provisions, being more recent and more specific than those in the 1842 Treaty, would apply to all extradition proceedings commenced thereafter. *Cf., Greci v. Birknes, supra; Iriarte v. United States*, 157 F.2d 105, 108 (1st Cir.), *cert. denied*, 355 U.S. 816 (1948).

The logical weakness of the Government's position becomes evident if we consider the case of someone who committed a crime in 1975 for which he was punished in the United States and whose extradition was sought by Canada in 1976. Under the Government's theory, even though the crime was committed in 1975, four years after the Canadian and American draftsmen decided that such dual prosecution should not be permitted, the defendant would not be afforded the protection of Article 4 because there was an unforeseen five year delay in the actual entry into force of the Treaty.* Obviously the draftsmen did not intend such a result in the case of someone whose extradition was sought five years after they inserted the protection of Article 4 into the Treaty.

In judging the validity of the suggestion that the United States and Canada did not intend any provisions of the 1971 Treaty other than Article 18 to apply to extradition proceedings commenced after the date it entered into force, if the offense at issue occurred prior to that date, it is

* In rejecting an argument that the 1971 Treaty applied to these proceedings, Judge Newman stated that the Canadian extradition demand was made in 1974 before the effective date of the Treaty. There is absolutely no support for this statement in the record. Indeed the record indicates that the demand was made in August 1976, which was after the effective date of the treaty.

helpful to consider that argument as it relates to one of the significant changes made by the 1971 Treaty which does not affect any right of a defendant. Article 10 of the Webster-Ashburton Treaty provided that the Requesting State would reimburse the Requested State for the expenses of the extradition proceeding. Article 17 of the 1971 Treaty changed that practice by providing that the Requested State would not make any claim for reimbursement of the expenses of the extradition proceeding. We seriously doubt the United States would seek reimbursement from Canada of its expenses in this 1976 extradition proceeding by claiming that the offense which gave rise to the request occurred in 1971. Obviously the parties did not intend that the applicability of the provision relating to reimbursement of expenses would depend upon the date of the offense rather than the date of the extradition proceeding.

Just as there is no reason to assume that the United States and Canada intended to make the application of the expense reimbursement provisions of the 1971 Treaty depend upon the date of the offense at issue, there is no reason to assume they intended to deny a party whose extradition was thereafter sought the substantive rights conferred by Article 4 which, like the double jeopardy clause of our constitution, simply recognizes the basic unfairness in punishing a man again in the Requesting State for a crime for which he had already been punished in the Requested State.

Indeed, had Galanis in 1972 pleaded guilty in the United States to a wire fraud charge involving the Champion fraud and received a five year prison sentence, we seriously doubt the Government would suggest he was not entitled to the protection of the dual prosecution prohibition of the 1971 Treaty. It is unfair to strip Galanis of that protection simply because Assistant U.S. Attorney Brodsky, for tactical reasons, chose not to make the

Champion fraud the specific basis of the Galanis indictment and Judge Brieant, on the basis of the Government's representation concerning Galanis' "overwhelming" cooperation and the threats to his own and his family's safety found it appropriate to impose only a six month jail sentence on Galanis, despite his admitted participation in a great number of serious frauds, including the Champion fraud.

In sum, the attempt to extradite Galanis to Canada in 1976 to face prosecution for an offense that was encompassed in the plea bargain he made with the United States Attorney and the sentence which Judge Brieant imposed violates the dual prosecution prohibition of the 1971 Treaty, and there is no reason to deny Galanis the protection of that provision.

POINT IV

Galanis Is Not Extraditable Because The Evidence Introduced Below Was Not Authenticated In The Manner Required By 18 U.S.C. § 3190.

The Government's evidence at the extradition hearing on the issue of probable cause was comprised solely of two documents. The first document was a declaration by one Theodore Arnold made in Zurich, Switzerland, on October 3, 1973, before a Zurich police officer and George Prenovost, a Canadian securities enforcement official, with exhibits attached (Gov't. Ex. 2, hereinafter the "Arnold Declaration"). The second document (Gov't. Ex. 3) was a collection of depositions taken in Canada on November 7, 8 and 14, 1973 before the aforementioned George Prenovost and Claude Gendron, an employee of the Quebec Securities Commission, together with exhibits (hereinafter the "Canadian Depositions").

Both documents were certified by a Deputy Minister of Justice for Canada as to signatures of certain persons and

the offices held by them. They were also certified by an official of the United States Consul in Canada.*

At the hearing, Judge Newman permitted Galanis to introduce substantial expert evidence that, despite these certifications, the documents were not, in fact, properly authenticated in accordance with Canadian law, and thus did not satisfy the admissibility standards of 18 U.S.C. § 3190.** However, in his decision Judge Newman reversed his position with respect to the admissibility of such expert testimony, struck the testimony, and adopted the Government's position that "where the certificate of the principal diplomatic or consular officer is in proper form, no inquiry is permitted into whether the rules of the demanding state would allow the admission of the evidence."

While the operative phrase of § 3190, "shall be proof," is arguably ambiguous, its plain meaning does not suggest the rigid construction given by the court below, which would add the words "absolute and irrebuttable" to the statute.

* The Consular certification stated as follows:

"I, . . . , hereby certify that the annexed papers being supporting documentation proposed to be used upon an application for the extradition from the United States of John Peter Galanis, charged with the crime of fraud alleged to have been committed in Canada, are properly and legally authenticated so as to entitle them to be received in evidence for similar purposes by the tribunals of Canada, as required by the Act of Congress of August 3, 1882."

** Section 3190 provides:

"Depositions, warrants, or other papers or copies thereof offered in evidence upon the hearing of any extradition case shall be received and admitted as evidence on such hearing for all the purposes of such hearing if they shall be properly and legally authenticated so as to entitle them to be received for similar purposes by the tribunals of the foreign country from which the accused party shall have escaped, and the certificate of the principal diplomatic or consular officer of the United States resident in such foreign country shall be proof that the same, so offered, are authenticated in the manner required."

As with the statutory language the limited case law available on this issue is not dispositive. Although the cases relied upon by Judge Newman, *In re McPhun*, 30 Fed. 57 (C.C.A.N.Y. 1887) and *In re Fowler*, 4 Fed. 303 (C.C.A.N.Y. 1880), do have *dicta* to the effect that a United States Consular certificate is "absolute proof" of the admissibility of the documents, the holding of those cases was based on found technical deficiencies in the certificates. More recent cases have recognized that a United States Consular certificate, though entitled to great weight, is not absolute proof, see *Greci v. Birknes*, *supra* at 960, n.6, and that courts will look beyond such a certificate where, as here, there is proof "that the documents were not authentic or not of the sort admissible in . . . [the demanding country] for the purposes of establishing the sufficiency of the evidence." *Shapiro v. Ferrandina*, 478 F.2d 894, 904 (2d Cir.), *cert. dismissed*, 414 U.S. 884 (1973).*

Judge Newman attempted to distinguish *Shapiro* from the present case on the ground that an attack was made on the completeness of the American Ambassador's certification. However, a careful reading of that opinion reveals that the problem of a defective or incomplete consular certification was covered by the first part of Judge Friendly's disjunctive construction of § 3190 where he stated that absent "any showing that the documents were not authentic," the certification would not be questioned. However, in the same sentence, Judge Friendly also

* In the 1880's, when the cases relied on by Judge Newman were decided, the courts were obviously reluctant to impose on a foreign state the substantial burden and long delays involved in producing in this country evidence as to the admissibility of documents sent here in support of a request for extradition. In modern times, with the ease of international telegraphic and mail communications and jet travel, it is not unreasonable to require such proof from the Requesting State when the defendant has made a *prima facie* showing that the evidence submitted in support of the request for extradition would not be admissible in the foreign jurisdiction.

recognized the propriety of looking beyond a consular certificate where, as here, there is proof that the documents are "not of the sort admissible in . . . [the demanding country] for the purposes of establishing the sufficiency of the evidence." *Shapiro v. Ferrandina, supra* at 904. Indeed, Judge Friendly stressed that the defendant in *Shapiro* had offered no evidence that the law of the demanding country had not been complied with. *Id.* at 903. Here, on the other hand, extensive and virtually un rebutted evidence on non-compliance with Canadian law was presented at the extradition hearing.

Judge Newman's rationale below was that diplomatic relations between this country and the demanding state would be somehow disrupted if, under § 3190, a United States District Judge, rather than a United States Consul, made what is clearly a judicial determination as to the meaning of foreign law.* This argument presupposes that the United States Consul gives "rubber stamp" approval to all extradition demands and does not independently determine whether the authenticity requirements of the foreign law have in fact been satisfied. Neither reason nor anything in the record below support such a view. In making his determination, the United States Consul necessarily ventures into what Judge Newman described as "the unfamiliar realm" of foreign law. Under these

* Judge Newman reasoned:

"Whenever any of the state or federal judicial officers authorized to conduct extradition hearings, 18 U.S.C. § 3184, has to venture into the unfamiliar realm of deciding how a foreign jurisdiction would interpret its own law, he may encounter uncertainty beyond the expected vagaries of domestic law. Here the stakes are higher than usual, for the risk of error is borne not by private litigants but by the foreign government itself. A misinterpretation of a foreign rule of law in an extradition proceeding deprives the foreign government of its treaty right to extradition and could have ramifications on relations between the United States and the foreign nation." (SR. 12, p. 27).

circumstances, judicial review of that decision can hardly have the diplomatic ramifications alluded to by Judge Newman. On the contrary, such review will afford protection against Judge Newman's fears.

Judge Newman also reasoned that petitioner will not be prejudiced by an erroneous certification by a United States Consul because petitioner can challenge the admissibility of the documents in the subsequent Canadian proceeding. This ignores the fact the challenge cannot be made until the defendant is taken from his home and forced to defend himself in a foreign jurisdiction. Indeed, Judge Newman's rationale completely undercuts the very purpose of an extradition proceeding, i.e., to determine, before the defendant is shipped to a foreign country, that the Requesting State has competent evidence with which to subsequently prosecute.

Petitioner respectfully submits that absent a clear expression by Congress that the United States Consul's certification shall be conclusive, petitioner must be afforded the opportunity to demonstrate that the State Department official was wrong, without, as Judge Newman held, being required to impugn the integrity of the certification process itself. At most, the United States Consul's certification creates a presumption that the authentication requirements of foreign law have been satisfied. This presumption obviates the necessity of foreign officials attending the extradition hearing merely for the purpose of authenticating documentary evidence. But that presumption is and must be rebuttable by a clear and convincing demonstration that, in fact, under the law of the foreign country, the documents would not be admitted.* If such a test were ap-

* Even Judge Newman conceded that:

"To give conclusive effect to the diplomatic certification and preclude proof of lack of authenticity is, as Wigmore says, an extreme step. 4 Wigmore, Evidence (Chadbourn Revision)

(footnote continued on following page)

plicable here, petitioner's "substantial" offer of proof would have clearly satisfied it. Accordingly, the decision below should be reversed.

Conclusion

The judgment appealed from should be reversed with a direction that the District Court enter an order dismissing the extradition proceeding against appellant.

Respectfully submitted,

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(footnote continued from preceding page)

§ 1348; see generally §§ 1345-52 and 2492 on conclusive preferences and presumptions."

See also *Berger v. Board of Psychologist Examiners*, 521 F.2d 1056, 1062 (D.C. Cir. 1975) and cases cited therein for the proposition that irrebuttable presumptions in criminal proceedings are constitutionally suspect, if not prohibited.

(62057)

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

JOHN PETER GALANIS,

Petitioner-Appellant,

against

ERMEN PALLANICK, U.S. MARSHAL FOR THE
DISTRICT OF CONNECTICUT,

Respondent-Appellee.

State of New York,
County of New York,
City of New York—ss.:

DAVID F. WILSON

being duly sworn, deposes

and says that he is over the age of 18 years. That on the 7th
day of October, 1977, he served two copies of the
Brief of Petitioner-Appellant on
Hon. Richard Blumenthal, U.S. Attorney for the
District of Connecticut

the attorney for the Respondent-Appellee
by depositing the same, properly enclosed in a securely sealed
post-paid wrapper, in a Branch Post Office regularly maintained
by the Government of the United States at 90 Church Street, Borough
of Manhattan, City of New York, directed to said attorney at
No. 270 Orange Street, New Haven, Conn. () ~~N.Y.~~
that being the address designated by him for that purpose upon
the preceding papers in this action.

David F. Wilson
.....

Sworn to before me this

7th day of October, 1977.

Courtney Brown
COURTNEY L. BROWN
Notary Public, State of New York
No. 31-5472920
Qualified in New York County
Commission Expires March 30, 1978

